Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

YLUMINADA MOJICA and JULIO ACEVEDO,
as Legal Representatives of JOSHUA ACEVEDO,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a child, who suffered from an encephalopathy and seizures within hours of receiving Diptheria Tetanus Pertussis (DTP) and Prevnar vaccines, whose Petition pursuant to the National Vaccine Compensation Act was timely prepared, timely entrusted to Federal Express for overnight delivery and timely served upon the Respondent, Secretary of Health and Human Services, and whose Petition was compensable under this remedial program, should have been dismissed as a result of the decision in *Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed Cir. 2001), *cert. denied sub nom*, 534 U.S. 1040 (2001) because Federal Express failed to deliver the package to the Clerk of the United States Court of Federal Claims until after the Statutory deadline had passed.

II. Whether substantial compliance with the statutory provisions for filing a Petition under the National Vaccine Compensation Act should prevent the dismissal of the Petitioner's claim and prevent a miscarriage of justice, where the Respondent, HHS, is timely served with the petition and admittedly suffers no prejudice, but the Clerk of the Federal Court of Claims is unable to timely stamp the Petition as "filed" due to the error of a third party courier in it's delivery of the Petition to the Court.

III. Whether the Congressional intent behind the creation of the National Vaccine Compensation Act, a remedial program, is defeated by the dismissal of a Petition under these circumstances where such dismissal forces these Petitioners to file suit against the manufacturer, the very action the creation of the Act sought to avoid.

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OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit Denied Petitioners' Petition for Rehearing En Banc by Order filed September 26, 2008. App. D at 36a-37a. The Opinion of the United States Court of Appeals for the Federal Circuit, 2008-5019 was decided on July 18, 2008. App. A at 1a-4a. The Opinion and Order of the United States Court of Federal Claims, No. 07-501V was filed on November 29, 2007. App. B at 5a-21a. The Decision of the United States Court of Federal Claims, Office of the Special Masters, No. 07-0501V was filed on August 31, 2007. App. C at 22a-35a. The Opinions as set forth above are unreported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit, affirmed the decision of the Untied States Court of Federal Claims, which affirmed the Decision of the United States Court of Federal Claims, Office of the Special Masters, handed down on July 18, 2008. A timely petition for rehearing was denied on September 26, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 300aa-11(a)(1) states that —

> A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition containing the matter prescribed by subsection (c) of this section with the United States Court of Federal Claims. The Clerk of the United States Court of Federal Claims shall immediately forward the Petition to the chief special master for assignment to a special master under 42 U.S.C. § 300aa-12(d)(1) of this title.

42 U.S.C. § 300aa-16(a) (2) states that —

> a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

STATEMENT OF THE CASE

Joshua Acevedo, an infant, suffered from an encephalopathy and seizures which occurred within hours of receiving his DPT and Prevnar vaccinations on June 28, 2004, an on table injury where there is no dispute that the vaccine caused the child's injuries. App. C at 24a-25a.

A Petition pursuant to the National Vaccine Compensation Act, 42 U.S.C. § 300aa-1 was timely prepared and timely served upon the Respondent, Secretary of Health and Human Services. App. B at 17a. The Petition was simultaneously, timely entrusted to Federal Express for guaranteed overnight delivery to the Clerk of the Court, but was lost by Federal Express and not received by the Clerk until after the Statute of Limitations had run, without notice to the Petitioner until after the filing deadline. The Petition was dismissed by the Courts below as untimely, based upon this Court's holding in *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001) which bars equitable tolling under the Vaccine Act. *Id.* at 1374.

The decision of the three judge Merits Panel of the United States Court of Appeals for the Federal Circuit ("Merits Panel") stated that it was obligated to follow the law of the circuit as expressed in *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001) "even though equitable reasons exist to excuse the delay in filing the Petition", App. A at 2a, and affirmed the dismissal of the Petition herein because as the Panel stated, *Brice* is good law until overturned by the Supreme Court or an en banc decision of this Court. App. A at 3a-4a.

The Special Master and Judge of the United States Federal Court of Claims opined that though the Petitioners took reasonable steps to fulfill their obligation to file in time, App. B at 16a-17a; 21a and "despite the harsh-untenable really result," App. C at 35a, and though "the result is draconian", App. B 21a, the Petition must be dismissed pursuant to this Court's holding in *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001) which holds that equitable tolling under the Vaccine Act is barred in all circumstances. App. B at 21a; App. C at 35a.

The Merits Panel concurred ". . . that the Petition must be dismissed even though equitable reasons exist to excuse the delay in filing the Petition," App. A at 2a, but affirmed holding "that *Brice* is the law and only a decision of the Supreme Court or an en banc decision of this Court can alter the holding in *Brice*." App. A at 3a-4a.

REASONS FOR GRANTING THE PETITION

As to the first question presented for review, the holding in *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001) is inflexible and contrary to the remedial intent of the Vaccine Act. In light of the course of events of the present matter, and the Petitioner's substantial compliance with the statutory requirements for initiating a claim pursuant to the Vaccine Act, and where the Respondent has admitted to suffering no prejudice, this Court must clarify, modify or otherwise realign the law with the intent of Congress in the creation of the Vaccine Act, a remedial program created to compensate individuals injured by vaccines like Joshua, and remedy the injustice that occurred in this case.

The National Vaccine Injury Compensation Program (The "Act") was established by Congress to compensate those suffering from vaccine related injuries and as an alternative to civil litigation, by diverting civil lawsuits against vaccine manufacturers into a less adversarial and more fair and generous arena than the existing Federal and State tort systems and with the intention of preventing the spread of infectious disease by vaccination, while protecting against the adverse reactions to those vaccines. 42 U.S.C. § 300aa-1. *Bunting v. Secretary of HHS*, 931 F.2d 867, 869 (Fed. Cir. 1991); *Flowers v. HHS*, 49 F.3d 1558, 1562 (Fed. Cir. 1995).

It is inconsistent with the intent of Congress in creating a remedial program that, under limited conditions, equitable tolling would not be applicable under the Vaccine Act. When something is labeled "remedial", it is "intended to correct something; a deficiency." *The American Heritage Dictionary*. Though mandatory vaccinations have eradicated many deadly diseases in this country, Congress recognized that for some, vaccinations were not without event. To that end, the National Vaccine Injury Compensation Program was intended, along with Congress' intent to protect the vaccine manufacturers from lawsuits, to compensate those that were injured by obligatory vaccinations.

In *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001), the Federal Circuit considered whether equitable tolling was available under the Act, where the Petitioner, despite knowing when the statutory deadline for filing a Petition would lapse, filed a Petition in excess of six months after the statutory deadline.

The Federal Circuit focused upon two Supreme Court Decisions, *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) and *The United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), and then concluded that equitable tolling would not apply to the Vaccine Act under any circumstance. The Federal Circuit in *Brice* reached this decision based upon the criteria set forth by the Supreme Court in it's decision in *The United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). However, the *Brice* Court recognized that, unlike the United States Tax Code in *Brockamp*, the Vaccine Act is not particularly technical, does not include multiple iterations of the limitations period and does not have the administrative complexity of the tax code. *Brice* at 1372 (Fed. Cir. 2001). Yet despite the fact that the Supreme Court in *Brockamp*, considered all of the factors "taken together", the Federal Circuit disregarded the first three criteria and rendered it's decision in *Brice* based upon only two of the *Brockamp* factors making parts of the statute superfluous. A statute must be read to avoid making any of it's parts superfluous. *Ashe-Cline v. HHS.*, 30 Fed. Cl. 40, 45 (CFC. 1993).

Congress established the Vaccine Act as a remedial, non adversarial, expeditious and generous program to compensate vaccine injured persons. *Bunting v. Secretary of HHS*, 931 F.2d 867, 869 (Fed. Cir. 1991); *Flowers v. HHS*, 49 F.3d 1558, 1562 (Fed. Cir. 1995). "In keeping with that purpose, and where justice demands, the law provides for equitable tolling as an exceptional remedy, reserved for extraordinary circumstances and

extended sparingly." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The person seeking equitable tolling of a statute of limitations must bear the burden of proving that such relief is warranted, and must demonstrate "rare and exceptional circumstances" warranting application of the doctrine. *O'Connell v. Secretary of Health and Human Services*, (Federal Claims, 2004) at 19, citing *Felder v. Johnson*, 204 F.3d 167, 170-171 (5th Cir. 2000). Accordingly, equitable tolling will only be applied when "extraordinary circumstances beyond plaintiff's control made it impossible to file the claim on time." *Seattle Audubon Society v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991)(emphasis added).

"Courts are not precluded from evaluating the reason for the delay or from providing equitable relief when justice demands." *Brice v. HHS*, 240 F.3d 1367, 1374 (Newman, J., dissenting). Judge Newman characterized the majority's holding in *Brice* as "neither a necessary interpretation of the Vaccine Act, nor a tolerable one." *Id*, stating that the Vaccine Act is a "case-specific system of individualized equities, meeting the criteria discussed in *Brockamp* as subject to tolling." *Id.* at 1375. (A6)

> Under such an interpretation, the Act does not restrict the power of federal courts to hold that the statute of limitations is tolled under circumstances not inconsistent with the Act's purpose, rather, '[t]he judicial prerogative, *indeed our obligation* (Emphasis added), is to provide access to equitable tolling when the circumstances warrant.' *Id.* at 1374. (A6).

> '[t]he just solution to the rare situation of delay beyond the statutory period . . . is not to deny all remedy in all situations' but instead is 'to view each situation with the sympathy, wisdom, and rigor appropriate to the particular case.'

Id. at 1376. (A6)

The facts in *Brice* do not reach the events of this case. The Brice's filed their Petition with the Clerk of the Court and served the Respondent over six months after the Statute of Limitations had run. The facts of the matter before this Court are illustrative of the type of exceptional circumstances that Judge Newman had in mind as warranting equitable tolling.

As the Courts below noted, the situation in this case is not one where the due diligence of the petitioners was in question, App. B at 16a, as was the case in *Brice*, but one where counsel took reasonable steps to prepare and entrust the petition to a well-established and well-known reputable third party courier, Federal Express, who prides itself as being the "world's largest express transportation company" that uses a global air and ground network to speed delivery of time sensitive shipments, usually in one to two business days with the delivery time guaranteed, App. C at 26a, for timely delivery and where Respondent was admittedly timely served. App. B at 16a, 21a. This Program is a National program in which private attorneys from all over the country represent petitioners who pursue claims. As a practical matter, reliance upon recognized delivery agents such as the United States Postal Service, FedEx,

UPS or DHL is required. App. C at 30a. Therefore, this matter involves the type of rare event that Judge Newman anticipated in her dissent and one where equitable tolling must apply.

Since the decision in *Brice*, the Supreme Court has stated that "Clarity would be facilitated if courts and litigant's use the label 'jurisdictional' not for claim processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 355 (2004)

Likewise the Supreme Court has termed time limitations as "claim processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdiction' . . . " *Eberhart v. U.S.*, 546 U.S. 12, 16 (2005), noting the confusion which has been caused by it's language in prior decisions which has forced the lower courts to err on the side of caution by giving time limitations the force of subject matter jurisdiction. *Id.* at 16. "In recent decisions we have clarified that time prescriptions, however emphatic, 'are not properly typed 'jurisdictional.'". *Arbaugh v. Y& H Corporation*, 546 U.S. 500, 510 (2006)

The within matter involves a timely prepared Petition, timely served upon the Respondent and timely forwarded to the Court for filing, but lost by a world renowned reputable courier that guarantees next day delivery. App. C at 26a. When jurisdiction lies in the Court of Federal Claims under a statutory waiver of sovereign immunity, such as the waiver found in the

Vaccine Act, it operates only as a procedural time constraint to disallow stale claims. To that end, the Petition was timely served upon the Respondent, Secretary of Health and Human Services who admittedly has suffered no prejudice. App. B at 17a.

As to the second question presented, the inflexible and ironclad ruling of the Court in *Brice v. HHS*, 240 F.3d 1367 (Fed. Cir. 2001), barring equitable tolling, under any circumstance, compelled the dismissal of the Petition in this case, where the Petitioners substantially complied with the statutory requirements by timely serving the Respondent, HHS, who has admitted to suffering no prejudice. App. B at 17a. The Petition addressed to the Clerk of the Court, was entrusted to a world renowned reputable courier that guarantees next day delivery, but was lost by that courier and not delivered until after the deadline, without notice to Petitioners of the delay.

42 U.S.C. § 300aa-11(a)(1) provides that "[a] proceeding for compensation under the Program for a vaccine related injury or death *shall* (emphasis added) be initiated by service upon the Secretary and the filing of a petition . . . with the United States Court of Federal Claims." "No petition *may* (emphasis added) be filed for compensation . . . for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . . of injury." 42 U.S.C. § 300aa-16(a)(2)

Unlike most civil actions which are initiated by the filing of a Complaint with service of the filed Complaint upon the defendant after filing, the Vaccine Act provides

for simultaneous timely service upon the Respondent and the Clerk of the Court. In fact, a reading of the Statute reveals that service of the Petition upon the Secretary is first and foremost in the construction of the statutory language for initiation of a claim under the program. 42 U.S.C. § 300aa-11(a)(1)

In light of the statutory construction, the Merits Panel at oral argument suggested that the statutory requirement of the Act for simultaneous service of the Petition upon the Respondent and the Clerk of the Court was one whose purpose was so that the Respondent, a government entity, would not be prejudiced by stale claims. The Merits Panel then proffered that such a requirement makes the filing of the Petition with the Clerk appear to be more of an administrative act for docketing and calendaring purposes. Similarly, Judge Lettow of the Federal Court of Claims opined in this matter that

> Petitioners' counsel timely served the petition upon the Secretary . . . the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it . . . the government does not contend that it was prejudiced by the brief delay in filing, and thus this not an instance where . . . dismissal is necessary . . .

(Citations omitted). App. B at 17a. To that end, the Merits Panel then queried of Respondent's counsel what the government would consider the failure to timely serve the Respondent, since the statutory scheme requires mandatory timely service of the Petition upon

the Respondent and the Clerk. The response of Respondent's counsel was that under that circumstance (the reverse of what happened in the matter now before the Court), the Petition would be considered improperly filed.

On rebuttal, Petitioners' counsel pointed out that if the government considers the failure to timely serve the Respondent, despite the mandatory statutory requirement to do so, only to be considered an "improper" filing of the Petition, then that would suggest that under certain circumstances, such a filing error can be and in all probability has been cured. This is supported by the fact that there are no reported cases under the Act which have dismissed a Petition timely prepared and timely filed with the Clerk, but not timely served upon the Respondent even though simultaneous service is mandatory. The government's own admission supports Petitioners' position that even the Respondent recognizes that, in certain circumstances, Congress intended equitable tolling to exist under the Act and, as such, the Federal Circuit's holding in *Brice* is inconsistent with Congress' intent and the government's own practices.

Petitioners herein timely served the Respondent with the Petition before the statute of limitations ran. App. B at 17a. Therefore, the Petition in this matter should only have been considered an "improper" filing, corrected and/or cured by the receipt of the Clerk of the Court of it's copy of the Petition, rather than dismissed, since the statutory requirements were substantially complied with.

At oral argument, the Merit Panel agreed that Petitioner had substantially complied with the statutory requirements, but noted that substantial compliance is an equitable remedy and equitable remedies do not apply to the vaccine act as a result of the holding in *Brice* ". . . the statute of limitations is not subject to equitable tolling . . . the petition must be dismissed, even though equitable reasons exist to excuse the delay in filing the petition." App. A at 21.

In construing a statute, the court must give effect to the legislative intent. Sources of legislative intent are the language of a statute, the policy behind the statute, concepts of reasonableness and legislative history. In interpreting a statute, the basic rule is that statutory language should be given it's ordinary meaning absent specific intent to the contrary. *Flowers v. HHS*, 49 F.3d 1558, 1560 (Fed. Cir. 1995); *Consumer Prod. & Safety Comm'n. v. GTE Sylvania, Inc.*, 446 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d. 766 (1980); *Schindler v. HHS*, 29 F.3d 607, 611 (Fed. Cir. 1994). A statute must be read to avoid making any of it's parts superfluous. *Ashe-Cline v. HHS.*, 30 Fed. Cl. 40, 45 (CFC. 1993). It is therefore, axiomatic that statutes which create remedial programs must be "liberally" and "broadly" construed in favor of the class which it is intended to assist. *White v. Arlen Realty and Development Corp.*, 374 F. Supp. 151 (D. Md. 1974).

42 U.S.C. § 300aa-16(2)a states in pertinent part ". . . no petition *may* be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant

aggravation of such injury . . ." It is noted that the word "may" was utilized while 42 U.S.C. § 300aa-11(a)(1) provides that "[a] proceeding for compensation under the Program for a vaccine related injury or death *shall* (emphasis added) be initiated by service upon the Secretary and the filing of a petition . . . with the United States Court of Federal Claims." Similarly, 42 U.S.C. § 300aa-12(e)(1), states in pertinent part, "upon issuance of the special master's decision, the parties *shall* have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision.", (emphasis added), the word "shall" was utilized. Certainly, Congress in using the word "may" rather than "shall" as it specifically did in other sections of the statute, recognized the need for equitable remedies when appropriate.

The definition of the word "may" includes expressing possibility, expressing permission, or expressing a wish or hope. While the definition of the word "shall" is defined as expressing a strong intention or assertion, expressing an instruction or command.

Prior to the Federal Circuit's decision in *Brice*, the Court had when justice demanded, accepted a Motion for Review after the 30 day period when faced with extraordinary circumstances. In *Raspberry v. Sec'y of DHHS*, 32 Fed. Cl. 777 (1995), a case exactly like the one at bar, the Petitioner mailed a Motion for Review two days before the deadline was to expire utilizing an established courier and relying on the courier's guarantee that the motion would be delivered overnight. The courier failed to live up to it's guarantee, and the motion was delivered one day beyond the thirty day time

limit. The Court accepted that Motion as timely filed under the specific facts involved in that matter.

Likewise, the Court permitted the filing of a Petition after the Statute of Limitations had run, where the claimant filed an otherwise timely pleading in the wrong court. *See Taylor v. Sec'y of DHHS*, 34 Fed. Cl. 137 (1995). This action supports the intention of Congress to relieve late filing under very limited conditions so as to preserve the Act's intention to compensate vaccine injured individuals who diligently attempt to file their claim.

The Federal Circuit's interpretation of the statutory language of the Act in it's holding in *Brice* was too restrictive and is contrary to the purposes for which the Act was established.

As to question number three, in the 1980s, Congress was presented with arguments that the government had made vaccinations obligatory in this country and had a responsibility to ensure that those injured by vaccines were compensated, along with threats by vaccine manufacturers to pull out of the vaccine market due to the high costs of litigation and occasional large recoveries which, in turn, caused higher insurance premiums and vaccine prices to rise. Congress provided a political solution by establishing a remedial program to compensate vaccine injured persons and an alternative to civil litigation by diverting civil lawsuits away from the vaccine manufacturers. *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 2 (1994). *Bunting v. Secretary of HHS*, 931 F. 2d 867, 869 (Fed. Cir. 1991); *Flowers v. HHS*, 49 F.3d 1558, 1592 (Fed. Cir. 1995).

While Congress made it clear that an individual injured by a vaccine must first turn to the Vaccine Program for relief, 42 U.S.C. § 300aa-11(a)(2)(A), an individual's civil remedies have been explicitly preserved by the tolling of state statutes of limitations during the pendency of a vaccine program proceeding. 42 U.S.C. § 16 (c). *Amendola v. HHS*, 989 F. 2d. 1181, 1184 (Fed. Cir. 1993).

While preserving an individual's right to pursue a civil action, it was the intent of Congress to discourage "victims from bringing those traditional tort cases by providing fairly generous, more easily obtainable Vaccine Court Awards. A victim who obtains such an award may hesitate to give up that bird in the hand in return for a larger, but more speculative, tort law award." *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 5 (1994).

Though an individual could decide to reject the findings of the Vaccine Court, 42 U.S.C. § 300aa-21(a)(2) and pursue his/her claim in civil court, by requiring a Petitioner to "exhaust the remedy under the Act before resorting to civil litigation," *Amendola v. HHS*, 989 F.2d 1181, 1184 (Fed. Cir. 1993), satisfied the Federal purpose of the Act "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market," *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 8 (1994).

Thus, it only stands to reason that it was not Congress' intentions to have a case forced to civil litigation against the manufacturer without the benefit of going through the Program, where a child suffers an on table reaction to his vaccinations and where his

Petition is timely prepared, timely served upon the Respondent and timely entrusted to a reputable courier for overnight delivery, but lost by that third party courier and thus not received by the Clerk until after the Statute of Limitations had run, due to the automatic dismissal of the Petition as a result of the Federal Circuit's holding in *Brice* which forecloses equitable tolling even in a situation such as the one before this Court.Thus, certiorari is warranted to address the injustice that a complete bar of equitable tolling under the Vaccine Act as set forth in *Brice* would occasion in light of the facts in this case where Petitioners substantially complied with the statutory requirements by timely serving the Respondent with the Petition and timely entrusting a copy of the Petition simultaneously forwarded to the Clerk of the Court to a reputable third party carrier, which lost the package, resulting in the Clerk not receiving a copy of the Petition and timely stamping it "filed" for docketing purposes. Thus, as a result of the ironclad holding in *Brice* barring equitable tolling under any circumstance, the Petition was dismissed barring the infant Petitioner from recovery for his injuries pursuant to a Program created and designed to compensate him for those injuries.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED JULY 18, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5019

YLUMINADA MOJICA and JULIO ACEVEDO, as Legal Representatives of JOSHUA ACEVEDO,

Petitioners-Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES.

Respondent-Appellee.

Appeal from the United States Court of Federal Claims in case 07-VV-501, Judge Charles F. Lettow.

DECIDED: July 18, 2008.

Before LINN, *Circuit Judge*, CLEVENGER, *Senior Circuit Judge*, and MOORE, *Circuit Judge*.

PER CURIAM.

Yluminada Mojica and Julio Acevedo ("petitioners"), as legal representatives for their son Joshua Acevedo, sought compensation under the National Vaccine Injury

Appendix A

Compensation Program. Respondent Secretary of Health and Human Services ("Secretary") moved to dismiss their case on the grounds that their claim is barred by the statute of limitations contained in 42 U.S.C. § 300aa-16(a)(2). The special master assigned to petitioners' case granted respondent's motion and the United States Court of Federal Claims affirmed. *Mojica v. Sec'y of Health and Human Servs.*, 79 Fed. Cl. 633 (2007). We *affirm.*

I.

The relevant statute of limitations provides that no petition for compensation may be filed "after the expiration of 36 months after the date of the occurrence of the first symptom of onset or of the significant aggravation of such injury." The Vaccine Act stipulates that "[a] proceeding for compensation . . . shall be initiated by service upon the Secretary and the filing of a petition . . . with the United States Court of Federal Claims." 42 U.S.C. § 300aa-11(a)(1) (2000). We have held that the statute of limitations is not subject to equitable tolling. *Brice v. Sec'y of Health and Human Servs.*, 240 F.3d 1367, 1374 (Fed.Cir.2001). In other words, if a petition for relief is filed outside the mandatory time period, the petition must be dismissed, even though equitable reasons exist to excuse the delay in filing the petition.

Appendix A

II.

In this case, it is undisputed that the petitioners filed their petition for relief with the Court of Federal Claims outside the 36 months allowed for filing by the statute of limitations. Because of this fact, the special master dismissed the petition as "duty bound to apply the law, despite the harsh-untenable, really-result." *Acevedo v. Sec'y of Health and Human Servs.*, No. 07-501V, 2007 WL 2706159, at *5 (Fed.Cl.Spec.Mstr. Aug. 31, 2007).

On petitioners' motion for review in the Court of Federal Claims, the court stated that it "is obliged to treat *Brice* as correctly stating the law, such that there is no possibility of equitable tolling under the Vaccine Act even in the circumstances presented by this case where counsel took reasonable steps to fulfill her obligation to file in time. This result is draconian but compelled by law." *Mojica*, 79 Fed. Cl. at 639.

III.

As is the case with the special master and the Court of Federal Claims, this panel is obligated to follow the law of the circuit as expressed in *Brice*. Until overturned by the Supreme Court or an en banc decision of this court, *Brice* is good law. *Texas American Oil Co. v. United States Dep't of Energy*, 44 F.3d 1557, 1561 (Fed.Cir.1995) (en banc) ("This court applies the rule that earlier decisions prevail unless overruled by the court en banc, or by other controlling authority such as

intervening statutory change or Supreme Court decision."). Because it is not disputed that the petition for relief under the Vaccine Act in this case was filed outside the time provided by the statute of limitations, we must affirm.

COSTS

No costs.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED NOVEMBER 29, 2007

UNITED STATES COURT OF FEDERAL CLAIMS

No. 07-501V
(Filed Under Seal: November 28, 2007)
(Filed: November 29, 2007)

Timeliness of petition for compensation under the Vaccine Act; 42 U.S.C. § 300aa-16(a)(2); subject matter jurisdiction; equitable tolling; application of *Brockamp* and *Brice*

YLUMINADA MOJICA and JULIO ACEVEDO, as legal representatives of JOSHUA ACEVEDO,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

Appendix B

OPINION AND ORDER[1]

LETTOW, Judge.

Yluminada Mojica and Julio Acevedo, legal representatives of Joshua Acevedo, seek review of a decision entered August 31, 2007 by a special master dismissing their petition for compensation under the National Childhood Vaccine Act of 1986, Pub.L. No. 99-660, § 311, 100 Stat. 3743, 3755 (Nov. 14, 1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34) ("Vaccine Act"). *Acevedo v. Secretary of Health & Human Servs.*, No. 07-501V, 2007 WL 2706159 (Fed.Cl.Spec.Mstr. Aug. 31, 2007) ("Jurisdictional Decision"). The special master's dismissal was predicated upon petitioners' failure to file their petition within three years from the date of the "first symptom or manifestation of onset" of injury. *Id.* at *5 (quoting 42 U.S.C. § 300aa-16(a)(2)). In seeking review, petitioners contend that the special master erred in refusing to invoke equitable grounds to toll the statute of limitations. Pet'rs' Mot. for Review of the Special Master's Decision ("Mot. for Review") at 5-8.

Petitioners concede that their petition for compensation was filed a few days after the 36-month

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1. In accord with the Rules of the Court of Federal Claims ("RCFC"), Appendix B ("Vaccine Rules"), Rule 18(b), this opinion and order was initially filed under seal. Each party was afforded fourteen days from the date of sealed filing to object to the public disclosure of any information supplied by that party. The parties promptly advised that no redactions were necessary, and thus the entire decision is being made public.

period specified in the Vaccine Act. Mot. for Review at 5-6. However, to excuse this failure, they point to diligent efforts by their counsel to file the petition on time, and to a series of extraordinary mishaps by a courier service that frustrated actual filing for a critical time interval. *Id.* Although the special master concluded that their position was forestalled by a decision of the Federal Circuit, *Brice v. Secretary of Health & Human Servs.*, 240 F.3d 1367 (Fed.Cir.2001) (holding that the statutory period for bringing a claim under the Vaccine Act is jurisdictional and not subject to equitable tolling), petitioners argue that *Brice* does not foreclose equitable tolling in proper circumstances. Mot. for Review at 14-16. In addition, petitioners contend that *Brice* should be reevaluated in light of the pendency before the Supreme Court of the United States of a case raising the question whether this court's subject matter jurisdiction under jurisdictional grants that include the Tucker Act, 28 U.S.C. § 1491(a), is constrained by the statute of limitations in 28 U.S.C. § 2501. *See John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354-55 (Fed.Cir.2006), *cert. granted*, __ U.S. __, 127 S.Ct. 2877, 167 L.Ed.2d 1151 (May 29, 2007).

Following briefing in this case, a hearing was held on October 29, 2007.

BACKGROUND

In their petition, Ms. Mojica and Mr. Acevedo allege that on June 28, 2004, their son, Joshua Acevedo, received a routine DTaP vaccination and a routine

Prevnar vaccination. Pet. ¶ 18. That night, he suffered episodes of shaking and began to run a fever. *Id.* ¶ 19. By morning, he exhibited "shaking of his upper extremities" that was accompanied by "drooling." *Id.* During the event, Joshua's "eyes deviated" to his left side. *Id.* He was taken by ambulance to Trinitas Hospital in Elizabeth, New Jersey, *id.* ¶ 20, where he experienced "intermittent startling attacks," *id.* ¶ 21, and was transferred to the pediatric intensive care unit at St. Peter's University Hospital in New Brunswick, New Jersey, where he remained until July 2, 2004. *Id.* ¶ 21, 26. A pediatric neurologist who evaluated Joshua at St. Peter's University Hospital concluded that Joshua had suffered "encephalitis," either "infectious" or "post[-]vaccine." *Id.* ¶ 23. By November 2004, Joshua displayed "increased muscle tone and [some] developmental delay," *id.* ¶¶ 34-36, such that the same pediatric neurologist recommended adoption of an "[e]arly [i]ntervention [p]rogram for physical therapy and occupational therapy." *Id.* ¶ 36.

After seeking the advice of an attorney, Ms. Mojica and Mr. Acevedo were referred to Mindy Michaels Roth, an attorney in New Jersey who is a member of the bar of this court and possesses considerable experience with vaccine claims. Affidavit of Mindy Michaels Roth (June 25, 2007) ("June Roth Aff."), ¶ ¶ 2, 4. Ms. Roth prepared a petition for compensation even though she lacked all documents required by 42 U.S.C. § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e), because the statute of limitations was due to lapse on June 28, 2007. *Id.* ¶ 3, 5, 7. That date was 36 months after the first symptom or

manifestation of the onset of injury. *See* 42 U.S.C. § 300aa-16(a)(2) ("No petition may be filed for compensation under the Program for [a vaccine-related] injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury."); *see also Markovich v. Secretary of Health & Human Servs.*, 477 F.3d 1353, 1358 (Fed.Cir.2007) (addressing the triggering date for the running of the statute of limitations and citing *Brice*, 240 F.3d at 1373).

On June 25, 2007, Ms. Roth tendered the petition to Federal Express for overnight delivery to the clerk of this court. *See* Affidavit of Mindy Michaels Roth (June 29, 2007) ("Second June Roth Aff."), ¶ 2, Exs. A, B. Besides the petition, the properly addressed package contained associated documents and a $250.00 check for the filing fee. *Id.* ¶ 2. The airbill designated that the package was for delivery via "[p]riority [o]vernight" shipping for arrival on the "[n]ext business morning." *Id.*, Ex. A at 1. It was thus due to arrive on the morning of June 25, 2007. However, Federal Express lost the package. *Id.*, Ex. B at 1.

Ms. Roth timely served a copy of the petition upon the Secretary "via Certified Mail/R[eturn] R[eceipt] R[equested]." Affidavit of Mindy Michaels Roth (July 20, 2007) ("July Roth Aff.") ¶¶ 3-4. The United States Postal Service delivered the service copy to the Secretary of Health and Human Services ("Secretary") on June 28, 2007. *See* July Roth Aff. ¶ 4, Ex. C; *see also* 42 U.S.C. § 300aa-11(a)(1) (mandating service of a petition upon the Secretary); Vaccine Rule 2(c) (same).

Although a tracking inquiry by Ms. Roth's assistant had shown that the package had arrived at Federal Express's "dest[ination] sort facility" in Dulles, VA, at 5:15 a.m., on June 26, 2007, July Roth Aff., Ex. E at 1, on June 29, 2007, Federal Express informed Ms. Roth that its records indicated that the package containing the petition had "arrived in [Federal Express's] Newark, NJ, sorting facility on June 25[, 2007] at 8:59 p.m.," and that Federal Express was "unable to locate" the package and considered the package "missing." Second June Roth Aff., Ex. B at 1.

Ms. Roth then prepared a second petition, accompanied by her second June affidavit explaining that she had timely submitted the first package to Federal Express, and she mailed the second petition with the affidavit via Federal Express to the clerk of this court during the late afternoon on June 29, 2007. *See* July Roth Aff., Exs. F-G. Ms. Roth again marked the airbill for "[p]riority [o]vernight" shipping with delivery slated for Monday, July 2, 2007. *Id.*, Ex. F at 1. Federal Express failed to deliver the second package to the clerk on July 2, 2007, but that package was delivered the next day, on July 3, 2007, at 10:17 a.m. Affidavit of Mindy Michaels Roth (July 9, 2007) ("First July Roth Aff."), Ex. A. The court processed the second petition as a new case with a filing date of July 3, 2007.

Federal Express finally delivered the first package to the court on July 13, 2007, and the clerk of the court also processed that petition as a new case with a filing date of July 13, 2007. The second-filed case thereafter

was dismissed by the special master as a duplicate of the case filed on July 3, 2007. *See* Jurisdictional Decision, 2007 WL 2706159, at *3.

The government moved to dismiss the first-filed petition as untimely due to the late delivery. The special master concluded that the petition was untimely and refused to apply the doctrine of equitable tolling, relying upon the Federal Circuit's holding in *Brice*, 240 F.3d 1367, that equitable tolling is not available for claims arising under the Vaccine Act. Jurisdictional Decision, 2007 WL 2706159, at *4-5. Noting that the "Federal Circuit's prohibition of the doctrine of equitable tolling in [Vaccine] cases appears complete and inflexible," the special master concluded that the statute of limitations in 42 U.S.C. § 300aa-16(a)(2) barred consideration of the petition. *Id.* at *4.

STANDARD FOR REVIEW

The Vaccine Act authorizes this court to review decisions by special masters in vaccine cases, and to "set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law." 42 U.S.C. § 300aa-12(e)(2)(B). Accordingly, the Vaccine Act requires this court to analyze conclusions of law by a special master to determine whether they are "not in accordance with law." *Markovich*, 477 F.3d at 1356; *Althen v. Secretary of Health & Human Servs.*, 418 F.3d 1274, 1277-78 (Fed.Cir.2005). Factual findings

by a special master may be set aside if they are found to be arbitrary or capricious or if a special master has abused his or her discretion in making such findings. *See Hines v. Secretary of Health & Human Servs.*, 940 F.2d 1518, 1528 (Fed.Cir.1991).

ANALYSIS

A. *Equitable Tolling in Light of* Brockamp *and* Brice

In *Brice*, the Federal Circuit considered the question of "whether equitable tolling is available for claims arising under [S]ection 16(a)(2) of the [Vaccine] Act, which applies to vaccines administered after the effective date of the Act ('post-Act cases')." 240 F.3d at 1367-68. The court held that "equitable tolling is not available in such cases." *Id.* at 1368.

The holding in *Brice* was based upon on the premise that in waiving sovereign immunity the Vaccine Act also sets jurisdictional limitations on actions against the government. The Federal Circuit emphasized that the Act's statute of limitations must be strictly and narrowly construed because it is "a condition on the waiver of sovereign immunity by the United States, and courts should be careful not to interpret a waiver in a manner that would extend the waiver beyond that which Congress intended." *Brice*, 240 F.3d at 1370 (internal quotes omitted). In reaching its conclusion that the limitations of Section 16(a)(2) of the Vaccine Act are jurisdictional, such that trial courts could not apply equitable tolling, the Federal Circuit focused on two

Supreme Court decisions, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), and *United States v. Brockamp*, 519 U.S. 347, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997). In *Irwin*, the Supreme Court addressed whether the time limits for filing an action in district court alleging a discrimination claim after receipt of a right-to-sue letter from the Equal Employment Opportunity Commission constituted an absolute jurisdictional limit or were subject to equitable tolling. 498 U.S. at 91-92, 111 S.Ct. 453. The Court held that equitable tolling was potentially available, although not adequately supported in the particular case before it. *Id.* at 95-96, 111 S.Ct. 453. The Court in *Irwin* adopted the broad rationale that following a congressional waiver of sovereign immunity, the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96, 111 S.Ct. 453 (quoted in *Brice*, 240 F.3d at 1370). Contrastingly, the Federal Circuit in *Brice* viewed *Brockamp* as a counterpoint to, and limitation on, the broad holding in *Irwin*. *Brockamp* was a tax case in which the Supreme Court refused to apply equitable tolling to allow late-filed suits for refunds. 519 U.S. at 354, 117 S.Ct. 849. The Federal Circuit in *Brice* considered that *Brockamp* "demonstrates that it is possible for the government to rebut *Irwin's* presumption of equitable tolling and also creates uncertainty exactly as to when equitable tolling is permissible." *Brice*, 240 F.3d at 1370. Relying on *Brockamp*, the court of appeals in *Brice* concluded that equitable tolling was inappropriate for the statute of

limitations in the Vaccine Act because "the relevant limitations statute manifested congressional intent to preclude tolling." *Id.* at 1370-71.

In reaching this result, the Federal Circuit in *Brice* examined a set of five circumstances or factors that the Supreme Court had considered in *Brockamp* as providing indicia of Congressional intent. Those circumstances related to "the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter." *Brice*, 240 F.3d at 1372 (citing *Brockamp*, 519 U.S. at 350-52, 117 S.Ct. 849). The court of appeals found that "three of these factors" were not present in *Brice* because the Vaccine Act is "not particularly technical" nor does it include multiple iterations of the limitations period nor compare in administrative complexity to the income tax provisions at issue in *Brockamp*. *Id.* at 1372-73. Nevertheless, "the remaining two factors [were] decisive." *Id.* at 1373. The court was persuaded that there was "good reason to believe that Congress did not want the equitable tolling doctrine to apply" because the Vaccine Act includes a specific exception from the limitations period for a petition improperly filed in a state or federal court. *Brice*, 240 F.3d at 1370 (quoting *Brockamp*, 519 U.S. at 350, 117 S.Ct. 849); *see* 42 U.S.C. § 300aa-11(a)(2)(B). The court also concluded that the limitations period is "part of a detailed statutory scheme which includes other strict deadlines." *Brice*, 240 F.3d at 1373.

Appendix B

Judge Newman dissented in *Brice*, opining that "courts are not precluded from evaluating the reason for the delay or from providing equitable relief when justice demands." *Brice*, 240 F.3d at 1374 (Newman, J., dissenting). She characterized the majority's holding as "neither a necessary interpretation of the Vaccine Act, nor a tolerable one." *Id.* In Judge Newman's view, the Vaccine Act is "a case-specific system of individualized equities, meeting the criteria discussed in *Brockamp* as subject to equitable tolling." *Id.* at 1375. Under such an interpretation, the Act does not restrict the power of federal courts to hold that the statute of limitations is tolled under circumstances not inconsistent with the Act's purpose; rather, "[t]he judicial prerogative, indeed our obligation, is to provide access to equitable tolling when the circumstances warrant." *Id.* at 1374. Judge Newman concluded that "[t]he just solution to the rare situation of delay beyond the statutory period . . . is not to deny all remedy in all situations" but instead is "to view each situation with the sympathy, wisdom, and rigor appropriate to the particular case." *Id.* at 1376.

The factual discussion in the majority opinion of *Brice* does not reach the events of this case, which might illustrate the type of exceptional circumstance that Judge Newman had in mind as warranting equitable tolling. As petitioners' counsel emphasizes, this is not a situation where the due diligence of the petitioners is substantially in question, as was the case in *Brice* where Judge Newman argued against a special master's conclusion that "there [wa]s no diligence in th[at] case,

much less due diligence." 240 F.3d at 1378. While the government argues that petitioners' counsel might have taken additional steps to ensure timely delivery of the petition,[2] the court concurs with the special master's finding that counsel took reasonable steps to prepare and entrust the petition to a reputable third party courier, Federal Express, for timely delivery. *See* Jurisdictional Decision, 2007 WL 2706159, at *3.[3]

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2. On the morning of June 26, 2007, the day after the initial package was given to Federal Express for delivery, petitioners' counsel's assistant checked with Federal Express's tracking service and was informed that the package had arrived at Dulles Airport. Affidavit of Mindy Michaels Roth (Aug. 27, 2007) ("August Roth Aff.") ¶ 5; Hr'g Tr. 9:7 to 10:2 (Oct. 29, 2007). Petitioners' counsel later that day queried her assistant to ask whether the petition had been received by the clerk's office and was assured that "it was there." Hr'g Tr. 9:15 (Oct. 29, 2007). However, the assistant had assumed without checking that the package would be delivered as scheduled. August Roth Aff. ¶ 6. The responsibility for that error falls on petitioners' counsel. Hr'g Tr. 9:18-20 (Oct. 29, 2007).

3. The special master concluded that counsel's steps were diligent, given that:

> [A] petitioner's attorney has limited options for delivering a petition to the Court. A petitioner's attorney may travel to Washington, D.C., to file a petition in person. The option is obviously impractical and expensive. A petitioner's attorney may retain local counsel to file a petition in person. The option—involving to an extent the duplication of effort—is also obviously impractical and

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Petitioners' counsel timely served the petition upon the Secretary, such that the defendant was not prejudiced by lack of notice. *Cf. Tiller v. Atlantic Coast R.R.*, 323 U.S. 574, 581, 65 S.Ct. 421, 89 L.Ed. 465 (1945) ("There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it."). The government does not contend that it was prejudiced by the brief delay in filing, and thus this is not an instance where, as identified by Judge Newman, dismissal is necessary "to provide fairness to defendants who might otherwise be presented with stale claims after evidence is lost and memories faded." *Brice*, 240 F.3d at 1376 (citing *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965)).

Nevertheless, *Brice's* holding categorically bars equitable tolling in all cases involving late petitions under the Vaccine Act. *See Brice*, 240 F.3d at 1374 (holding that "equitable tolling i[s] inconsistent with the existing statutory scheme"). As Judge Newman stated in dissent, the panel majority held that the Vaccine Act "never permits equitable tolling of the period for filing a claim . . . no matter how worthy the petitioner or how compelling the petition." *Id.* at 1374 (Newman, J., dissenting).

(Cont'd)

> expensive. Or, as with most practitioners, a petitioner's attorney may entrust a petition to a recognized delivery agent, such as the United States Postal Service, FedEx, UPS or DHL.

Jurisdictional Decision, 2007 WL 2706159, at *3.

Appendix B

B. *The Pendency of* John R. Sand & Gravel Company *Before the Supreme Court*

Petitioners filed a motion for this court to "reserve or stay" its decision in this case until after the Supreme Court renders its decision in *John R. Sand & Gravel Co. v. United States*, No. 06-1164, *cert. granted*, 127 S.Ct. 2877, 167 L.Ed.2d 1151 (May 29, 2007), which was argued on November 6, 2007. Pet'rs' Mot. for Stay (filed Nov. 19, 2007). The question pending before the Supreme Court on certiorari is "whether the statute of limitations in [28 U.S.C. § 2501] limits the subject matter jurisdiction of the Court of Federal Claims." *See* 127 S.Ct. 2877 (limiting review to "Question 1 presented by the petition"). Petitioners' counsel properly raises *John R. Sand & Gravel* as potentially relevant to this case because *John R. Sand & Gravel* implicitly addresses the viability of equitable tolling in many suits against the government in this court. Upon consideration of petitioners' motion however, the court concludes that the Supreme Court's decision regarding jurisdiction and equitable tolling of the limitations period generally applicable to cases brought in this court under the Tucker Act and other statutory grants of jurisdiction to this court should not affect the outcome of this particular case.

In *John R. Sand & Gravel*, the Federal Circuit followed older precedents in reaffirming that the six-year statute of limitations set forth in 28 U.S.C. § 2501 is jurisdictional in nature, requiring that suits be timely filed for this court to have subject matter

jurisdiction over a cause of action. *See John R. Sand & Gravel*, 457 F.3d at 1354. If the Supreme Court concurs that Section 2501 is jurisdictional, then under the logic of the Supreme Court's recent decision in *Bowles v. Russell*, __ U.S. __, __, 127 S.Ct. 2360, 2366, 168 L.Ed.2d 96 (2007), this court will *639 have no authority to apply the doctrine of equitable tolling to claims arising, for example, under the Tucker Act, 28 U.S.C. § 1491(a). *See Bowles*, 127 S.Ct. at 2366 ("This court has no authority to create equitable exceptions to jurisdictional requirements."). Such a result would only strengthen by analogy the force of *Brice*, precluding equitable tolling under the Vaccine Act.

On the other hand, if the Supreme Court reverses the Federal Circuit's decision in *John R. Sand & Gravel* and holds that the statute of limitations in 28 U.S.C. § 2501 is a typical such statute, constituting an affirmative, non-jurisdictional defense, and therefore is subject to equitable tolling in appropriate cases, the petitioners in this case will nonetheless be afforded little if any help. Under *Irwin*, statutes of limitations for suits against the federal government that resemble a suit against a private party are subject to a rebuttable presumption of equitable tolling. *Irwin*, 498 U.S. at 95-96, 111 S.Ct. 453. *Brockamp* addresses the grounds for rebutting that presumption and for concluding that a statute of limitations is jurisdictional, 519 U.S. at 349-52, 117 S.Ct. 849, and there is no suggestion that *Brockamp* will be disturbed by a decision in *John R.*

Sand & Gravel. Indeed, in their oral argument, the petitioners in *John R. Sand & Gravel* argued:

> [T]he way the Court has framed the issues in *Irwin* to say that there is a presumption that statutes of limitation are tollable and, therefore, are not jurisdictional in our view, tends to show that the Court wants a clear statement from Congress. The presumption language says Congress may at any time say otherwise and make a statute of limitations jurisdictional. . . . [I]t's very important to understand that the *Brockamp* decision did not speak in jurisdictional terms. . . . [I]t spoke in terms of statutory interpretation. . . . So *Irwin*, standing unassailed since that time, has forced the courts to look at the plain language of the statute, which is precisely what we advocate this Court does.

John R. Sand & Gravel, No. 06-1164, Tr. of Oral Argument at 49-50. Correspondingly, in deciding *Brice*, the Federal Circuit engaged in the process which *Brockamp* illustrates and which the petitioner in *John R. Sand & Gravel* advocates, namely, looking at the individual statute to determine whether equitable tolling is proper or instead inappropriately expands the waiver of sovereign immunity. Because the Federal Circuit has already interpreted the Vaccine Act under its understanding of *Brockamp* and that interpretation is unlikely to be undercut by *John R. Sand & Gravel*, there are no grounds for this court to stay a decision in

this case pending the Supreme Court's decision in *John R. Sand & Gravel.*

This court is obliged to treat *Brice* as correctly stating the law, such that there is no possibility of equitable tolling under the Vaccine Act even in the circumstances presented by this case where counsel took reasonable steps to fulfill her obligation to file in time. This result is draconian but compelled by law.

CONCLUSION

For the foregoing reasons, petitioners' motion for review is DENIED, and the decision of the special master rendered August 31, 2007 is AFFIRMED.

Petitioners' motion for stay pending the Supreme Court's disposition of *John R. Sand & Gravel* is DENIED.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge

APPENDIX C — DECISION OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED AUGUST 31, 2007

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: August 31, 2007)

PUBLISH

No. 07-0501V

Statute of Limitations; Doctrine of Equitable Tolling; Special Master's Authority: Dismissal

JULIO ACEVEDO and YLUMINADA MOJICA, as legal representatives of their son, JOSHUA ACEVEDO,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

Appendix C

DECISION[1]

EDWARDS, Special Master.

Petitioners, Julio Acevedo and Yluminada Mojica (Mr. Acevedo and Ms. Mojica), as legal representatives of their son, Joshua Acevedo (Joshua), seek compensation under the National Vaccine Injury Compensation Program (Program).[2] *See generally* Petition (Pet.). Respondent moves to dismiss. *See generally* Respondent's (Motion), filed July 31, 2007. Respondent contends that the statute of limitations contained in § 300aa-16(a)(2) bars the action. *See* Motion at 3-5.[3]

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1. As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

2. The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

3. Section 300aa-16(a)(2) provides:

> In the case of—
>
> a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-

(Cont'd)

Appendix C

BACKGROUND

The parties do not dispute the relevant facts. Joshua was born on March 26, 2004. *See* Petitioners' exhibit (Pet.ex.) 1 at 1. As part of a routine physical examination on June 28, 2004, Joshua received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination and a pneumococcal conjugate (Prevnar) vaccination. *See* Pet. ex. 6 at 5, 18, 21. Joshua experienced "startling episodes through the night" on June 28, 2004. Pet. ex. 8 at 5. At approximately 5:00 a.m., on June 29, 2004, Joshua was "warm to touch." *Id.* Mr. Acevedo and Ms. Mojica administered "Tylenol." *Id.* At approximately 8:00 a.m., on June 29, 2004, Joshua exhibited "generalized stiffness with shaking of [his] upper extremities," accompanied by "drooling," that "lasted about 10 min [ute]s." *Id.* During the event, Joshua's "eyes deviated to [his] [left] side." *Id.* Mr. Acevedo and Ms. Mojica summoned eventually an ambulance to transport Joshua to Trinitas Hospital in Elizabeth, New Jersey. *See* Pet. ex. 8 at 7. In the Trinitas Hospital Emergency Department, Joshua was "crying," but "consolable." Pet. ex. 8 at 6. He refused "to suck." *Id.* He experienced "intermittent startling attacks." *Id.* A "consulting

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> related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

physician" arranged a "TRANSFER TO ST. PETER[']S HOSPITAL P[EDIATRIC] I[NTENSIVE] C[ARE] U[NIT]." Pet. ex. 8 at 21. Joshua remained at St. Peter's University Hospital in New Brunswick, New Jersey, until July 2, 2004. *See* Pet. ex. 9 at 1. Carlos Lastra, M.D. (Dr. Lastra), a pediatric neurologist who evaluated Joshua at St. Peter's University Hospital, *see, e.g.*, Pet. ex. 9 at 20-21; Pet. ex. 6 at 22, concluded that Joshua had suffered "acute encephalitis," either "infectious" or "post[-]vaccine." Pet. ex. 6 at 12. By November 2004, Joshua displayed "increased muscle tone and some developmental delay." Pet. ex. 6 at 13. Dr. Lastra recommended an "Early Intervention Program for physical therapy and occupational therapy." *Id.*

Mr. Acevedo and Ms. Mojica retained a lawyer. *See* June 25, 2007 Affidavit of Mindy Michaels Roth (6/25/07 Affidavit), filed July 3, 2007, ¶ 2. The lawyer referred Mr. Acevedo and Ms. Mojica to another attorney, Mindy Michaels Roth (Ms. Roth), who possesses substantial Program experience. *See* 6/25/07 Affidavit, ¶ 4. Understanding that the statute of limitations contained in § 300aa-16(a)(2) would lapse on June 28, 2007, Ms. Roth prepared a Program petition even though she lacked all documents required by § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e). *See* 6/25/07 Affidavit, ¶ 10; *see also* June 29, 2007 Affidavit of Mindy Michaels Roth (6/29/07 Affidavit), filed July 3, 2007 ¶ 3. Before the close of business on June 25, 2007, Ms. Roth tendered to FedEx Express a package addressed properly to the Clerk, United States Court of Federal Claims, that contained Mr. Acevedo's and Ms. Mojica's Program

petition, associated documents and a $250.00 check for the filing fee. *See* 6/29/07 Affidavit, ¶ 2; 6/29/07 Affidavit, Exhibit A; 6/29/07 Affidavit, Exhibit B. On the airbill, Ms. Roth designated "FedEx Priority Overnight" for "[n]ext business morning" delivery. 6/29/07 Affidavit, Exhibit A at 1. As mandated by § 300aa-11(a)(1) and by Vaccine Rule 2(c), Ms. Roth served a copy of Mr. Acevedo's and Ms. Mojica's Program petition upon the Secretary. *See* Notice of Filing Documents (Notice), filed July 3, 2007, at 1-2; July 20, 2007 Affidavit of Mindy Michaels Roth (7/20/07 Affidavit), filed July 30, 2007, ¶¶ 3-4. Ms. Roth sent the service copy "via Certified Mail/RRR." Notice at 1; *see also* 7/20/07 Affidavit, ¶¶ 3-4; 7/20/07 Affidavit, Exhibit C.

Well-established and well-known, FedEx Express prides itself as being "the world's largest express transportation company" that "uses a global air-and-ground network to speed delivery of time-sensitive shipments, usually in one to two business days with the delivery time guaranteed." FedEx.com, FedEx Express Overview, http://www.fedex.com/us/about/today/companies/express/ index.html (last visited August 24, 2007). Nevertheless, FedEx Express did not deliver the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a $250.00 check for the filing fee to the United States Court of Federal Claims on June 26, 2007, on June 27, 2007, or on June 28, 2007. *See, e.g.*, 6/29/07 Affidavit, Exhibit B. Meanwhile, the United States Postal Service delivered the service copy to the Secretary on June 28, 2007. *See* 7/20/07 Affidavit, Exhibit C.

Appendix C

At some point on June 29, 2007, a FedEx Express Customer Relations agent informed Ms. Roth that although FedEx Express records indicated that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a $250.00 check for the filing fee had "arrived in [FedEx Express's] Newark, NJ, sorting facility on June 25 [, 2007] at 8:59 p.m.," FedEx Express was "unable to locate" the package and considered the package "missing." 6/29/07 Affidavit, Exhibit B at 1. Also at some point on June 29, 2007, a "tracking" inquiry showed that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a $250.00 check for the filing fee had arrived at a FedEx Express "dest[ination] sort facility" in "Dulles, VA," at 5:15 a.m., on June 26, 2007. 7/20/07 Affidavit, Exhibit E at 1. The "tracking" inquiry showed too that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a $250.00 check for the filing fee remained at the FedEx Express "dest[ination] sort facility." *Id.*

Immediately upon learning of FedEx Express's service failure, Ms. Roth prepared a second Program petition, as well as her affidavit explaining that her attempt to submit a timely petition had been thwarted by FedEx Express's errors. *See* 6/29/07 Affidavit. FedEx Express retrieved a package addressed properly to the Clerk, United States Court of Federal Claims, that contained the second petition from Ms. Roth's office during the late afternoon on June 29, 2007. *See* July 9, 2007 Affidavit of Mindy Michaels Roth (7/9/07 Affidavit),

filed July 16, 2007, Exhibit A; *see also* 7/20/07 Affidavit, Exhibits F-G. On the shipping label, Ms. Roth designated "Priority Overnight," with delivery slated for Monday, July 2, 2007. 7/20/07 Affidavit, Exhibit F at 1.

FedEx Express did not deliver the package that contained the second petition to the United States Court of Federal Claims on July 2, 2007. *See, e.g.*, 7/9/07 Affidavit, Exhibit A. A FedEx Express Customer Relations agent explained to Ms. Roth that a "courier" had "encoded the destination station" of the package that contained the second petition "incorrectly," causing the package "to be sent to Moonachie, NJ, rather than Washington, DC." 7/9/07 Affidavit, Exhibit A at 1. However, the FedEx Customer Relations Agent assured Ms. Roth that FedEx Express delivered the package that contained the second petition to the United States Court of Federal Claims "on July 3 [, 2007] at 10:17 a.m." *Id.*

Upon receipt of the package that contained the second petition, the clerk of court processed the petition as a new case, assigning the case a filing date of July 3, 2007, and assigning the case docket number 07-0501V.

On July 13, 2007, FedEx Express delivered finally to the United States Court of Federal Claims the package that Ms. Roth had tendered to FedEx Express on June 25, 2007, for delivery on June 26, 2007. The clerk of court processed the petition as a new case, assigning the case a filing date of July 13, 2007, and

assigning the case docket number 07-0376V.[4] On July 19, 2007, the special master dismissed the case filed under docket number 07-0376V as a duplicate of the case filed under docket number 07-0501V. *See Acevedo v. Secretary of HHS,* No. 07-0376V, Decision (Fed.Cl.Spec.Mstr. July 19, 2007). The clerk of court entered judgment in the case filed under docket number 07-0376V on August 21, 2007. *See Acevedo v. Secretary of HHS,* No. 07-0376V, Judgment (Fed.Cl. Aug. 21, 2007).

DISCUSSION

A petitioner initiates a Program action "by service upon the Secretary *and* the filing of a petition . . . with the United States Court of Federal Claims." § 300aa-11(a)(1) (emphasis added); *see also* Vaccine Rule 2(a). It is axiomatic in United States Court of Federal Claims practice that mailing is not filing. *See, e.g.,* Vaccine Rule 17(a). Rather, a petition "is filed when actually received and marked filed by the clerk." Vaccine Rule 17(a); *see also Widdoss v. Secretary of HHS,* 989 F.2d 1170, 1176 n. 5 (Fed.Cir.1993).

As the name indicates, the National Vaccine Injury Compensation Program is nationwide in scope. Private

4. Given the dates that the clerk of court processed the cases, the docket numbers of the cases appear to be in reverse order. However, the clerk of court assigned docket number 07-0376V to the case filed on July 13, 2007, because docket number 07-0376V was the next available docket number-even though the docket number was out of sequence-based upon an earlier administrative error in the clerk's office that was unrelated to proceedings in this case.

attorneys from across the country represent petitioners who pursue Program compensation for vaccine-related injuries or deaths. However, the United States Court of Federal Claims and the Office of Special Masters are located in Washington, D.C. Vaccine Rules do not allow ever the facsimile transmission of pleadings for filing. Likewise, Vaccine Rules do not allow ever the electronic submission of a petition for filing in the Court's Case Management/Electronic Case Filing (CM/ECF) system. Therefore, a petitioner's attorney has limited options for delivering a petition to the Court. A petitioner's attorney may travel to Washington, D.C., to file a petition in person. The option is obviously impractical and expensive. A petitioner's attorney may retain local counsel to file a petition in person. The option-involving to an extent the duplication of effort-is also obviously impractical and expensive. Or, as with most practitioners, a petitioner's attorney may entrust a petition to a recognized delivery agent, such as the United States Postal Service, FedEx, UPS or DHL.

Mr. Acevedo and Ms. Mojica acknowledge readily that neither petition that Ms. Roth dispatched to the United States Court of Federal Claims through FedEx Express arrived at the Court to be "marked filed by the clerk," Vaccine Rule 17(a), by June 28, 2007, the expiration of the statute of limitations governing their case. *See, e.g.*, 6/29/07 Affidavit, ¶¶ 4-8; 7/9/07 Affidavit, ¶ 10; 7/20/07 Affidavit, ¶¶ 5-8. Nevertheless, Mr. Acevedo and Ms. Mojica contend that the special master must deem their petition to have been filed by June 28, 2007. *See, e.g.*, 6/29/07 Affidavit, ¶ 11; 7/9/07 Affidavit, ¶¶ 9-11;

7/20/07 Affidavit, ¶ 10; Opposition to Respondent's Motion to Dismiss (Response), filed August 15, 2007; August 27, 2007 Affidavit of Mindy Michaels Roth (8/27/07 Affidavit), filed August 28, 2007, ¶ 9. They maintain that when Ms. Roth placed a package addressed properly to the Clerk, United States Court of Federal Claims, that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a $250.00 check for the filing fee with FedEx Express on June 25, 2007, for delivery on June 26, 2007-two days before the expiration of the statute of limitations governing their case—they believed reasonably that FedEx Express would fulfill its "guaranteed" contractual obligation. *See, e.g.*, 6/29/07 Affidavit, ¶ 11; 7/9/07 Affidavit, ¶¶ 9-11; 7/20/07 Affidavit, ¶ 10; Response; 8/27/07 Affidavit, ¶¶ 3-4. Yet, Mr. Acevedo and Ms. Mojica argue, the facts demonstrate that FedEx Express failed *twice* to deliver their petition to the United States Court of Federal Claims in accordance with FedEx Express's "guarantees." *See, e.g.*, 7/9/07 Affidavit, ¶¶ 4-7, 10; 7/20/07 Affidavit, ¶¶ 5, 8-9; Response. Thus, Mr. Acevedo and Ms. Mojica insist that they should not be held accountable for FedEx Express's "negligence and incompetence." 7/9/07 Affidavit, ¶ 11; *see also* 6/29/07 Affidavit, ¶ 11; 7/20/07 Affidavit, ¶ 10; Response; 8/27/07 Affidavit, ¶ 9. Besides, Mr. Acevedo and Ms. Mojica note, the Secretary received the service copy within the statute of limitations period. *See* 7/20/07 Affidavit, ¶ 4; 7/20/07 Affidavit, Exhibit C; Response. Therefore, Mr. Acevedo and Ms. Mojica advance that the Secretary suffers no prejudice if the special master directs the clerk of court to revise the filing date of the petition to

sometime between June 26, 2007, and June 28, 2007. *See* Response.

Mr. Acevedo and Ms. Mojica invoke necessarily the doctrine of equitable tolling. *See, e.g., Widdoss*, 989 F.2d at 1178-79 (Newman, J., dissenting).[5] The doctrine of equitable tolling "permits a court to forgive a late filing where compelling circumstances indicate that such a result would be equitable." *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21, 25 (1995). In *Irwin v. Department*

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5. The circumstances of the case suggest also the common law mailbox rule. The common law mailbox rule provides that "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). Congress can "abrogate a common law rule" specifically by addressing the issue posed by the common law, *Rios v. Secretary of Veterans Affairs*, 490 F.3d 928, 931 (Fed.Cir.2007), citing *United States v. Texas*, 507 U.S. 529, 534 (1993), or "impliedly" by creating a scheme "where application of the common law rule would render an aspect of the statute superfluous or inoperative." *Rios*, 490 F.3d at 931, citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991). However, Mr. Acevedo and Ms. Mojica recognize that the Clerk, United States Court of Federal Claims, received both petitions, albeit late. Further, the common law mailbox rule does not appear to extend to private corporations, like FedEx Express. Moreover, the Vaccine Act's elaborate structure signals that Congress intended to abrogate the common law mailbox rule for Program claims. *See, e.g., Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed.Cir.2001), *cert. denied sub nom.*, 534 U.S. 1040 (2001).

of Veterans Affairs, 498 U.S. 89, 95-96 (1990), the Supreme Court announced that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Indeed, in 1995, two judges of the United States Court of Federal Claims applied the doctrine of equitable tolling to allow a petitioner to proceed on motion for review of a special master's decision when the United States Court of Federal Claims received the motion for review after the statutory 30-day period for bringing a motion for review. *See Raspberry v. Secretary of HHS*, 32 Fed. Cl. 777 (1995) (involving late delivery by established overnight courier); *Thornton v. Secretary of HHS*, 34 Fed. Cl. 72 (1995) (involving disrupted mail service due to recognized National holiday); *see also Taylor v. Secretary of HHS*, 34 Fed. Cl. 137 (1995) (discussing, but declining to apply, doctrine of equitable tolling where counsel erred in calculating statutory 30-day period).

However, in 2001, the United States Court of Appeals for the Federal Circuit (Federal Circuit) addressed specifically the doctrine of equitable tolling in Program cases. *See Brice*, 240 F.3d 1367. After parsing the Act that established the Program, the Federal Circuit determined that "equitable tolling is inconsistent with the existing statutory scheme" devised by Congress to foster "quick resolution of Vaccine Act claims." *Brice*, 240 F.3d at 1374. Therefore, the Federal Circuit held as a matter of law that equitable tolling is not available for claims arising under § 300aa-16(a)(2). *See Brice*, 240 F.3d at 1372. The Federal Circuit's

prohibition of the doctrine of equitable tolling in Program cases appears complete and inflexible. *See, e.g., Brice,* 240 F.3d at 1374 (Newman, J., dissenting) ("The panel majority today holds that the National Childhood Vaccine Injury Act *never* permits equitable tolling of the period for filing a claim, whether the claim arose before the statutory enactment or afterward, no matter how worthy the petitioner or how compelling the petition.") (emphasis added); *Decker v. Secretary of HHS,* 51 Fed. Cl. 288, 292-97 (2001).

The Program represents a waiver of sovereign immunity. *See, e.g., Markovich v. Secretary of HHS,* 477 F.3d 1353, 1360 (Fed.Cir.2007), citing *Brice,* 240 F.3d at 1370. Therefore, the special master must construe "strictly and narrowly" Program provisions. *Markovich,* 477 F.3d at 1360. Likewise, *Brice* represents Federal Circuit precedent. The special master and the United States Court of Federal Claims "may not deviate from" Federal Circuit precedent. *Crowley v. U.S.,* 398 F.3d 1329, 1335 (Fed.Cir.2005). As the Federal Circuit iterated in *Althen v. Secretary of HHS,* 418 F.3d 1274 (Fed.Cir.2005), a special master applies merely "the law" as announced by the Federal Circuit. *Id.* at 1280. Thus, a special master possesses absolutely no authority "to craft" any exceptions to the Federal Circuit's proscription regarding equitable tolling in Program cases. *Id.* at 1281.

Mr. Acevedo and Ms. Mojica concede that they did not file a Program petition before "the expiration of 36 months after the date of the occurrence of the first

symptom or manifestation of onset" of Joshua's alleged vaccine-related injury. § 300aa-16(a)(2). The special master is duty-bound to apply the law, despite the harsh—untenable, really—result. Federal Circuit precedent dictates that the special master rule that the statute of limitations contained § 300aa-16(a)(2) bars Mr. Acevedo's and Ms. Mojica's Program action.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Acevedo's and Ms. Mojica's copy of this decision to Mr. Acevedo and Ms. Mojica by overnight express delivery.

s/ John F. Edwards
John F. Edwards
Special Master

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 26, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(CFC – 07-VV-501)

MOJICA V HHS, 2008-5019

ORDER

A petition for rehearing en banc having been filed by the Appellants, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

Appendix D

The mandate of the court will issue on October 3, 2008.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 09/26/2008